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No. 98-161

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

JOHNNY BUTLER, et al.,
Petitioners

v.

DELORES SCOTT SULLIVAN, et al.,
Respondents

ON CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The Pennsylvania Workers' Compensation Act, 77 Pa. Stat. Ann. Sections 1, *et seq.*, creates a public benefit in workers' compensation benefits, including wage replacement and medical benefits. These benefits constitute a recognized property interest under Pennsylvania law. Pursuant to Sections 306(f.1)(5) and (6), 77 P.S. Sec. 531(5) and (6) of the Act, insurance companies providing workers' compensation insurance to Pennsylvania employers are delegated the power by the state to stop injured workers' medical benefits without notice or a prior opportunity to be heard. A counterstatement of the issues raised by the supporting Petition for review characterized as a Conditional Cross-Petition for Writ of Certiorari filed by the Commonwealth of Pennsylvania is:

1. Is the petition for allowance of review filed by the Commonwealth of Pennsylvania, and characterized as a Conditional Cross-Petition for Writ of Certiorari, in reality a petition filed in support of the petitions for a Writ of Certiorari filed on behalf of the American Manufacturers Mutual Insurance Company, *et al* (No. 97-2000) and the School District of Philadelphia (No. 97-2030) and therefore untimely in accordance with Rule 12.6 of the Rules of this Court?

2. Do Sections 306(f.1)(5) and (6) of the Pennsylvania Workers' Compensation Act, which provide for the cessation of workers' compensation medical benefits without notice to the injured worker or any pre-deprivation opportunity to be heard, violate the injured workers' right to due process of law?

TABLE OF CONTENTS

		Page
Counterstatement of Questions Presented		i
Table of Authorities		ii
Counterstatement		1
Procedural History		1
Reasons for Striking or Denying the Conditional Cross-Petition		3
I.	The Untimely Supporting Petition Filed by the Commonwealth Should Be Stricken.	3
II	The Commonwealth Has Suggested No Reason Why This Court Should Review the Due Process Holding of the Third Circuit.	5
	A. Rights to Workers' Compensation Benefits Are Public, Not Private, in Nature.	5
	B. There Is No Conflict Between and Among The Federal and State Courts	6
Conclusion		10

TABLE OF AUTHORITIES

Cases	Page
Armstrong v. Manzo, 380 U.S. 545 (1965)	8
Beckler v. North Dakota Workers' Compensation Bureau, 418 N.W. 2d. 770 (N.D. 1988)	1,4,6,7
Bible v. Commonwealth, 548 Pa. 247 (Pa. 1997)	6
Board of Regents v. Roth, 408 U.S. 564 (1972)	5
Carr v. SAIF Corp., 670 P.2d 1037 (Or. 1983)	1,4,7
Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)	6
Connecticut v. Doehr, 501 U.S. 1 (1991)	7
Cryder v. Oxendine, 24 F.3d 175 (11th Cir. 1994)	1,7,8
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	8
Mathews v. Eldridge, 424 U.S. 319 (1976)	6,8
Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978)	6
Sauceda v. Department of Labor and Industry, 917 F.2d 1216 (9th Cir. 1990)	1,7

Page

Statutes and Rules

Supreme Court of the United States Rules
Rule 12.5 4
Rule 12.6 1,4

Pennsylvania Workers' Compensation Act i,2
77 P.S. §§ 1, *et seq.*

COUNTERSTATEMENT

The Commonwealth of Pennsylvania ("Commonwealth") has filed an untimely request for review supporting the due process arguments of earlier and timely filed Petitions which it has characterized as a Conditional Cross-Petition for Writ of Certiorari. It has taken this action to avoid the clear mandate of Rule 12.6 which states that any respondent who supports the position of a petitioner shall meet the petitioner's time schedule for filing documents, except that a response supporting the petition shall be filed within 20 days after the case is placed on the docket, and that time will not be extended. As more fully set forth below, it is clear that the Commonwealth's Conditional Cross-Petition must be stricken as untimely.

More importantly to the Court's decision regarding review, however, the Commonwealth raises no new arguments regarding the singular issue of due process cursorily examined by its petition to this Court and in fact, cites only cases which fully support the holding of the Court below. *Cryder v. Oxendine*, 24 F.3d 175 (11th Cir. 1994); *Sauceda v. Department of Labor and Industry*, 917 F.2d 1216 (9th Cir. 1990); *Beckler v. North Dakota Workers' Compensation Bureau*, 418 N.W. 2d. 770 (N. Dak. 1988); and *Carr v. SAIF Corp.*, 670 P.2d 1037 (Or. 1983).

Procedural History

As more fully set forth in their Brief in Opposition filed in response to the petitions for Certiorari filed by ten insurance companies ("Insurers")[1] and the School District of Philadelphia

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[1] Manufacturers' Mutual Insurance Co., Commercial Union Insurance Co., Continental Casualty Co., Donegal Mutual Insurance Co., Hartford Fire Insurance Co., Insurance Company of North America, United States Fidelity and Guaranty Company, and Zurich

("School District"),[2] the individual plaintiffs in the district court action were ten seriously injured workers who had their workers' compensation medical benefits stopped by unsupported requests for utilization review by their employers or their employers' insurer without notice or an opportunity to be heard before their property right in those benefits was abrogated. The United States Court of Appeals for the Third Circuit upheld the injured workers' challenge to Sections 306(f.1)(5) and (6) of the Pennsylvania Workers' Compensation Act ("the Act") holding, in pertinent part, that the supersedeas provisions were violative of "the dictates of due process by not affording disabled employees notice or an opportunity to be heard before their medical benefits are suspended." App. 33a.[3]

The Insurers and the School District filed motions to stay the mandate on April 2, 1998. By order dated April 21, 1998, the Third Circuit denied the motions and the mandate issued accordingly. Since then, the Commonwealth has modified its procedures without significant difficulty or expense. Claimants now receive pre-termination notice that utilization review has been filed, a description of the reasons for the request for review, and a pre-termination opportunity to submit written testimony to the utilization reviewer. While negotiations are continuing as to how the system should be further modified in light of the Third Circuit's decision, the significant due process concerns that prompted this litigation have been largely corrected.

Insurance Company, designated herein as "Insurers," filed a Petition for Writ of Certiorari, No. 97-2000, on June 11, 1998.

[2] No. 97-2030, filed June 11, 1998.

[3] All citations to the Appendix refer to the Appendix attached to the petition filed under Case No. 97-2000.

On July 11, 1998, both the Insurers and the School District filed timely Petitions for Certiorari requesting that this Court review, *inter alia,* the due process violation holding of the Third Circuit. The Commonwealth did not seek a stay of the Third Circuit's mandate, did not file a petition within the 90 day period after entry of judgment as set forth in Rule 13.1, and did not comply with the 120 day mandate for a response supporting the original petitions as set forth in Rule 12.6. Instead, recognizing that it would not meet the deadlines imposed by those rules, it filed on July 10, 1998 a request for relief which it mischaracterizes as a "Conditional Cross-Petition" under Rule 12.5. That Rule allows a respondent to file a non-supporting petition (i.e., one dependent on the Court's grant of review of the timely filed Petition) within 30 days after the case has been placed on the docket. The Commonwealth's Petition does not qualify as a non-supporting Petition under the rules, and is untimely.

REASONS FOR STRIKING OR DENYING THE CONDITIONAL CROSS-PETITION

I. THE UNTIMELY SUPPORTING PETITION FILED BY THE COMMONWEALTH SHOULD BE STRICKEN

As recited above, the Commonwealth did not file its supporting petition until July 10, 1998, which was 119 days from the date the decision was docketed by the Court. Rule 12.6 of the Rules of the Supreme Court of the United States specifically provides that:

> any respondent who supports the petitioner shall meet the petitioner's time schedule for filing documents, except that a response supporting the petition shall be filed within 20 days after the case is placed on the docket, and that time will not be extended.

The Commonwealth's submission, while characterized as a "Conditional Cross-Petition for Writ of Certiorari" is clearly a document "supporting" the positions espoused by both the Insurers (No. 97-2000) and the School District (No. 97-2030). It raises no new issue or prayer for relief. It provides no new insight into the reasons cited by either the Insurers or the School District for granting the underlying Writ. Relying extensively and broadly on the Petition filed by the Insurers (No. 97-2000) and citing pages 14 through 20 and 2 through 28 of that Petition, the Commonwealth, without any analysis, suggests that the due process and state action holdings of the Third Circuit are in conflict with other jurisdictions and should be reviewed by the Court so as to provide guidance for similar claims in the future. The Commonwealth's total discussion of this complex issue is encapsulated in just four pages of broad principles, mimicking the content of the earlier filed petitions. Tellingly, the Commonwealth only cites two cases not cited and fully analyzed by the original Petitioners (i.e., *Beckler* and *Carr*), and both of those cases fully support the position of the injured workers on the issue of due process.

While Rule 12.5 does permit the filing of a true Cross-Petition within 30 days of the date the case is docketed, the document filed by the Commonwealth is neither a request for additional relief nor a suggestion of a new ground for the imposition of such relief, as contemplated by that rule. It is without question "a response supporting" the earlier and timely filed petitions and, in accordance with Rule 12.6, is clearly filed out of time.

Accordingly, it is requested that the conditional Petition filed by the Commonwealth be stricken.

II THE COMMONWEALTH HAS SUGGESTED NO REASON WHY THIS COURT SHOULD REVIEW THE DUE PROCESS HOLDING OF THE THIRD CIRCUIT.

A. Rights to Workers' Compensation Benefits Are Public, Not Private, in Nature.

Assuming that the request for relief of the Commonwealth was timely filed, the Cross-Petition provides no basis for review by this Court. Arguing that the "application of due process principles to workers' compensation" laws presents "an important question of federal law" (Commonwealth Cross-Petition ("Cross-Pet.") at 13), the Commonwealth proffers only that: (1) all states have workers' compensation laws, *id.*; (2) Pennsylvania employers (and not the state) are required to provide benefits by state law (Cross-Pet. at 14); and (3) therefore, in Pennsylvania, workers' compensation benefits are not a public benefit to which due process mandates should apply. This perversion of Socratic logic provides no basis for review.

First, the decision of the Court below was highly dependent on the unique nature of the Pennsylvania workers' compensation system and its utilization review procedures. While most states have adopted workers' compensation laws, those statutorily mandated systems differ dramatically from state to state. Such differences preclude the uniformity of analysis necessary to require this Court's review.

Second, the system created by statute is one that guarantees the right to compensation benefits, including medical treatment, to workers injured on the job. Unlike the private provision of health care or automobile insurance, workers' compensation benefits constitute an entitlement guaranteed to every Pennsylvania worker and enforced through the Commonwealth's police power. *Bible v. Commonwealth*, 548 Pa. 247 (Pa. 1997). The right to these benefits cannot be bargained away and employees cannot opt out of the system. An

injured employee in Pennsylvania has a statutorily guaranteed right to those benefits, thereby providing a Fourteenth Amendment protectable property right. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).[4] The right to those benefits most certainly is not an issue arising from a dispute between two private parties as suggested by the Commonwealth.[5]

B. There Is No Conflict Between and Among the Federal and State Courts.

The Commonwealth, relying entirely on the analysis of the Insurers in their Petition (No. 97-2000), also suggests conflicts "between and among state and federal courts" (Cross-Pet. at 16). Putting aside the fact that this is not the ultimate test for determining whether a matter is appropriate for review by this Court, the Commonwealth cites only four cases to support this "conflict" theory. Each of these cases fully supports the reasoning and conclusions reached by the Third Circuit on the issue of due process.

In a holding almost identical to the Third Circuit's in the present case, the Supreme Court of North Dakota held that an injured

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[4] That workers' compensation benefits are protected property for purposes of the 14th Amendment was never contested by any party below. For a fuller discussion as to why workers' compensation benefits in Pennsylvania are public benefits, see respondents' Brief In Opposition in 97-2000 and 97-2030, at 7-9.

[5] The Commonwealth directly copied the Insurers' argument that the Third Circuit's decision fails to accord any weight to the private interest of the Insurers and is thus in violation of this Court's supposed pronouncements in *Connecticut v. Doehr*, 501 U.S. 1 (1991). For all the reasons set forth in the Respondent's Brief in Opposition in 97-2000 and 97-2030 at 28 n.20, this argument is meritless.

worker was entitled to notice and the opportunity to be heard (albeit that a formal evidentiary hearing was not required) before his or her benefits could be denied:

> Our analysis therefore focuses on the process due Beckler before the Bureau may terminate his disability benefits. Due process does not insist upon inflexible procedures uniformly applicable to every imaginable situation. But, minimum components of due process mandate that, except in unusual circumstances, a deprivation of liberty or property be preceded by some form of notice of the contemplated action and an opportunity for a hearing appropriate to the nature of the case. Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978); Mathews v. Eldridge, supra; Gross v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); Goldberg v. Kelly, supra; see Friendly, "Some Kind of Hearing," 125 U.Pa.L.Rev. 1267 (1975).

Beckler v. North Dakota Workers' Compensation Bureau, 48 N.W. 2d. at 773.

Citing to *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978) and *Mathews v. Eldridge*, 424 U.S. 319 (1976) and a number of state and federal decisions, that Court held that the absence of such minimal safeguards would violate the due process mandates of the United States and North Dakota constitutions:

> While Beckler must be accorded an opportunity to respond to the termination of disability benefits, we do not expect a pretermination evidentiary hearing with an occasion to confront witnesses. In our view an evidentiary hearing before termination would

> unduly burden the governmental interest because medical records will usually resolve whether the claimant can work. Rather, we believe that opportunity to respond should be limited to a written submission as an initial check against an erroneous decision. In this respect our holding rests in part on the Bureau conducting a timely post-termination evidentiary hearing and on the Bureau's authority to award retroactive disability benefits. Because the Bureau did not provide Beckler with necessary pretermination procedures, we hold that he is entitled to the benefits he seeks.

Id. at 774 (footnote omitted, citations omitted).

In *Carr v. SAIF Corporation*, *supra*, the Oregon Court of Appeals also rejected several suggestions made by the Commonwealth of Pennsylvania herein, holding that (1) an injured worker's right to continuing benefits was a protectable property interest under the Fourteen Amendment, and (2) he or she was entitled to procedural presuspension safeguards including adequate notice and an opportunity to be heard. *Carr v. SAIF Corporation*, 670 P.2d 1037 at 1042, 1046. The Oregon Court also held that the acknowledged intervention, almost identical to the scheme in Pennsylvania, constituted governmental action raising due process protections. *Id.* at 1040.

In *Cryder v. Oxendine*, 24 F.3d 175 (11th Cir. 1994) and *Sauceda v. Department of Labor and Industry of the State of Washington*, 917 F.2d 1216 (9th Cir. 1990), both courts held only that under the pre-termination procedures provided by the controlling statutes, the injured worker *was* provided with adequate safeguards (including in each case adequate notice and an opportunity to respond) which comported with the dictates of due process. In each case, the Court's analysis hinged on the unique characteristics of each state's system. *Cryder*, 24 F.2d. at 177 ("Due process is a flexible concept

that varies with the particular situation. The question before us is whether the Georgia system satisfies the fundamental requirement of due process by providing a claimant an opportunity to be heard 'at a meaningful time and in a meaningful place.' *Mathews [v. Eldridge]*, 424 U.S. [319] at 333, 96 S.Ct. at 902 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). We believe it does"); *Sauceda*, 917 F.2d at 1219 ("a self-insured employer cannot suspend benefits without the department's approval. And the Department must inform a claimant of its decision to suspend benefits with its reasons, and give him sixty days to protest or request reconsideration.")(statutory citations omitted).

Accordingly, it is again urged that, on the facts of the present case, given the exclusiveness of the state's control over the administration of the system, the clarity of the public nature of the benefits at issue, and the fact that those benefits constitute constitutionally protected property, the Third Circuit's decision that the utilization review procedures are constitutionally deficient for their failure to accord pre-deprivation notice or opportunity to be heard of any kind was correct. A "legislature ... may not constitutionally authorize the deprivation of a [property] interest, once conferred, without appropriate procedural safeguards." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). Review should therefore be denied.

CONCLUSION

For all the reasons stated herein, Respondents-Injured Workers request that the Conditional Cross-Petition of the Commonwealth of Pennsylvania be stricken as untimely or denied on its merits.

Respectfully submitted,

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